IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

John Frederick Martin,	:	
	:	
Plaintiff,	:	
	:	**Case No. 483819-V**
v.	:	**[2021 MDBT 1]**
	:	
Gelman, Rosenberg & Freeman	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

On April 1, 2021, the parties appeared, through counsel, for a hearing on the defendant's motion to dismiss the plaintiff's amended complaint. The motion will be denied for the reasons set out below.

Procedural Background

The plaintiff, John Frederick Martin ("Mr. Martin"), is a United States citizen who resides in Vienna, Austria.

The defendant, Gelman, Rosenberg & Freedman ("GRF"), is a professional services corporation with a principal place of business in Bethesda, Maryland.

On October 20, 2020, Mr. Martin filed the original complaint in this case.[1] On January 19, 2021, GRF filed a motion to dismiss the original complaint.[2]

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[1] Docket Entry No. 1.

[2] Docket Entry No. 12.

On February 19, 2021, Mr. Martin filed an amended complaint.[3] According to the amended complaint, "this is an action for accounting malpractice arising out of Defendant's failure to preserve a valuable tax exemption known as the Deceased Spousal Unused Exclusion ('DSUE') after Mr. Martin's wife, Daniela Winkler, died on January 27, 2017."[4] On March 3, 2021, GRF filed a motion to dismiss Mr. Martin's amended complaint for failure to state a claim upon which relief can be granted.[5] On March 18, 2021, Mr. Martin filed an opposition to the defendant's motion to dismiss.[6]

Standard of Review

In considering a motion to dismiss for failure to state a claim, the court "must assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn therefrom. Dismissal is proper only if the alleged facts fail to state a cause of action." *A.J. DeCoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). "[A]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768 (1986).

Under Md. Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." Unlike Rule 8(a) of the Federal Rules of Civil Procedure, Maryland retains vestiges of code pleading in that a plaintiff must allege sufficient facts to constitute a cause of action. *Ver Brycke v. Ver Brycke*, 379 Md. 669,

[3] Docket Entry No. 27.

[4] First Amended Complaint ("FAC") at ¶ 1.

[5] Docket Entry No. 30.

[6] Docket Entry No. 31.

696-97 (2004); *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997). "The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 644 (2010). The court credits facts pleaded in the complaint and reasonable inferences from those facts but not "conclusory charges that are not factual allegations." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995); *see Mohiuddin v. Doctors Billing & Mgmt. Solutions, Inc.*, 196 Md. App. 439, 445 (2010).

Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999). The court's review of the motion in this case will be cabined to the four corners of the complaint, the documents referred to in or appended to the complaint as exhibits, and "those facts that may fairly be inferred from the matters expressly alleged." *Bennett Heating & Air Conditioning v. NationsBank*, 342 Md. 169, 174 (1996); *see Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 n.13 (2015).

"When the claim at issue is in tort, the court 'merely determines [the plaintiff's] right to bring the action,' and does not decide whether the claims are meritorious." *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 226 Md. App. 420, 437 (2016) (quoting *Figueiredo-Torres v. Nickel*, 321 Md. 642, 647 (1991)).

The Deceased Spousal Unused Exclusion ("DSUE")

26 U.S.C.A. § 2001 imposes a tax "on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States" and provides the rate schedule that is to be used to compute the tentative tax on the taxable estate. 26 U.S.C.A. § 2501

imposes a tax, "computed as provided in section 2502," "for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident." In computing the gift tax, 26 U.S.C.A. § 2502 refers to the rate schedule provided by 26 U.S.C.A. § 2001(c).

26 U.S.C.A. § 2010(a) provides that "a credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by section 2001."

Treas. Reg. 20.2010-1 provides the following definitions related to 26 U.S.C.A. 2010(a):

> ***
>
> (e) Explanation of terms.
>
> (1) Applicable credit amount. The term applicable credit amount refers to the allowable credit against estate tax imposed by section 2001 and gift tax imposed by section 2501....The applicable credit amount is determined by applying the unified rate schedule in section 2001(c) to the applicable exclusion amount.
>
> (2) Applicable exclusion amount. The applicable exclusion amount equals the sum of the basic exclusion amount and, in the case of a surviving spouse, the deceased spousal unused exclusion (DSUE) amount.
>
> (3) Basic exclusion amount. Except to the extent provided in paragraph (e)(3)(iii) of this section, the basic exclusion amount is the sum of the amounts described in paragraphs (e)(3)(i) and (ii) of this section.
>
> **(i)** For any decedent dying in calendar year 2011 or thereafter, $5,000,000; and
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> **(ii)** For any decedent dying after calendar year 2011 and before calendar year 2018, $5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year of the decedent's death by substituting "calendar year 2010" for "calendar year 1992" in section 1(f)(3)(B) and by rounding to the nearest multiple of $10,000. For any decedent dying after calendar year 2017, $5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year of the decedent's death by substituting "calendar year 2010" for "calendar

> year 2016" in section 1(f)(3)(A)(ii) and rounded to the nearest multiple of $10,000.
>
> **(iii)** For any decedent dying after calendar year 2017, and before calendar year 2026, paragraphs (e)(3)(i) and (ii) of this section will be applied by substituting "$10,000,000" for "$5,000,000."
>
> (4) Deceased spousal unused exclusion (DSUE) amount. The term DSUE amount refers, generally, to the unused portion of a decedent's applicable exclusion amount to the extent this amount does not exceed the basic exclusion amount in effect in the year of the decedent's death.

There are specific steps that must be taken in order for a surviving spouse to take advantage of the DSUE. Specifically, 26 U.S.C.A. § 2010(c)(5) states:

> A deceased spousal unused exclusion amount may not be taken into account by a surviving spouse...unless the executor of the estate of the deceased spouse files an estate tax return on which such amount is computed and makes an election on such return that such amount may be so taken into account. Such election, once made, shall be irrevocable. No election may be made under this subparagraph if such return is filed after the time prescribed by law (including extensions) for filing such return.

Furthermore, Treas. Reg. 20.2010-2 states that:

> (a) Election required for portability. To allow a decedent's surviving spouse to take into account that decedent's deceased spousal unused exclusion (DSUE) amount, the executor of the decedent's estate must elect portability of the DSUE amount on a timely filed Form 706, "United States Estate (and Generation – Skipping Transfer) Tax Return" (estate tax return). This election is referred to in this section and in 20.2010-3 as the portability election.

Amended Complaint

Count I – Negligence (Professional Malpractice)

Mr. Martin contends that GRF "held itself out as a professional accounting firm possessing the requisite skill of the profession and thus owed Mr. Martin a duty of care to perform accounting services it undertook on his behalf with reasonable care."[7]

[7] FAC at ¶ 32.

Mr. Martin also contends that GRF breached that duty "by failing to file [Form 706] within nine (9) months from the date of Ms. Winkler's death (or seek an automatic six-month extension) which resulted in the loss of the DSUE" and that "[GRF's] failure to do so fell below the standard of care and was a breach of its duty to Mr. Martin."[8] Finally, Mr. Martin contends that he has "suffered financial loss caused by the loss of the DSUE and [GRF's] breach of its duty was the actual and proximate cause of Mr. Martin's losses."[9]

In support of his claim, Mr. Martin makes a number of specific factual allegations. On February 8, 2017, just twelve (12) days after Ms. Winkler's death, Mr. Martin "advised [GRF] of [Ms. Winkler's] passing and sought its assistance on all tax matters arising out of her death."[10] Mr. Martin sent Walter Deyhle ("Mr. Deyhle") and Troy Turner ("Mr. Turner") of GRF an email that stated:

> Dear Walter, with unbearable sadness I have to report that Daniela died on January 27 after her struggle with lung cancer.
>
> You may wish to think about things I need to do with regard to tax authorities or social security or whoever in the way of notices or valuations. Am I right that it would be useful to have a current valuation of her property (such as the London home, etc.)? And can these be third party opinions but not necessarily full-fledged valuation exercises?
>
> Let me know what I should be thinking about. I am now just beginning to come to grips with the various paperwork requirements.
>
> Thanks.
>
> Fred[11]

[8] FAC at ¶ 33.

[9] FAC at ¶ 34.

[10] FAC at ¶ 17.

[11] FAC at ¶ 17.

On February 21, 2017, "after a brief email exchange about the need for formal appraisals of Ms. Winkler's assets," GRF wrote to Mr. Martin and told him that, "[u]nfortunately everything needs formal appraisals. The federal estate forms require this."[12] After February 21, 2017, "there is a voluminous email record between Mr. Martin and [GRF] making clear that Mr. Martin looked to [GRF] for advice on the filing requirements concerning Ms. Winkler's estate."[13]

On December 8, 2017, Mr. Turner "advised Mr. Martin that he would need to file an estate tax return in order to get 'transfer credits' which was erroneous advice because Ms. Winkler was a United States citizen."[14] According to the amended complaint, this mistake was "all the more surprising given that [GRF] had been filing Ms. Winkler's annual US tax returns for more than 30 years and were familiar with her citizenship as well as her finances and net worth."[15]

On March 1, 2018, Mr. Martin asked GRF whether he needed to file a federal estate tax return, and if so, what information it needed.[16] On March 2, 2018, Mr. Turner responded that "[GRF] thought that the estate tax attorney was preparing the estate tax return, but that there was no harm because 'there is a provision to make a late [portability] election and the due date under that provision is 2 years from her date of

[12] FAC at ¶ 18.

[13] FAC at ¶ 19.

[14] FAC at ¶ 22.

[15] FAC at ¶ 22.

[16] FAC at ¶ 22.

death, so we have time if an extension was not filed."[17] According to the amended complaint, given the size of Ms. Winkler's estate, this information was incorrect.[18]

On June 11, 2018, Mr. Turner volunteered that "we will get started on the estate return right away and get back to you."[19] Hearing nothing, in July of 2018, Mr. Martin again asked GRF if it could "proceed with Daniela's estate tax return."[20]

In October of 2018, Mr. Turner emailed Mr. Martin that GRF "would complete the estate return after the October 15, 2018 filing deadline for Mr. Martin's 1040," but it failed to provide him any draft estate return in 2018.[21]

In the summer of 2019, GRF finally informed Mr. Martin that they had missed the deadline to file Form 706.[22] On July 1, 2019, Mr. Turner wrote to Mr. Martin to advise him that [GRF] had completed Form 706.[23] While doing so, Mr. Turner "stated that they were now 'outside the 2-year window' to make a portability election and suggested that Mr. Martin hire a lawyer to prepare a request for a private letter ruling seeking relief from the deadline, failing to understand that PLR relief was not available as a fail-safe if the original deadline had been missed."[24] According to the amended complaint, the July 1,

[17] FAC at ¶ 23.

[18] FAC at ¶ 23.

[19] FAC at ¶ 24.

[20] FAC at ¶ 24.

[21] FAC at ¶ 25.

[22] FAC at ¶ 26.

[23] FAC at ¶ 26.

[24] FAC at ¶ 26.

2019 email was the first time Mr. Martin had become aware that the deadline for portability had been missed.[25]

On July 2, 2019, Mr. Turner wrote an email to Mr. Martin. The email stated:

> Dear Fred,
>
> I apologize for the surprise and uncertainty on the portability issue. We didn't know that we were going to handle the 706 process until after the due date had passed. Often the estate attorney handles it but we should have asked to make sure someone was doing it before the 9 month deadline. My initial thought in March of 2018 when we took on the 706 task was that we had until January 2019 to file and get portability. When we began the process of preparing the form in June of 2018 and saw that the asset value required a filing we realized at that time that the 2 year timeframe to get automatic portability did not apply so that made the January 2019 due date irrelevant.[26]

According to the amended complaint, "Mr. Martin currently has a substantial estate, which will be subject to transfer taxes (estate and gift tax) as the value of his assets exceed, and will continue to exceed, his basic exclusion amount provided by federal law."[27] Continuing, "Ms. Winkler's federal estate tax return shows that she died with $3,575,490.00 of unused, portable DSUE that Mr. Martin lost due to [GRF's] negligence."[28] Mr. Martin alleges that he wishes to transfer assets to his sons during his lifetime in an amount in excess of his basic exclusion amount.[29] Consequently, "due to

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[25] FAC at ¶ 26.

[26] FAC at ¶ 28.

[27] FAC at ¶ 8.

[28] FAC at ¶ 12.

[29] FAC at ¶ 13.

the lost DSUE, it is now more costly for Mr. Martin to give the same amount of gifts during his lifetime."[30]

Motion to Dismiss

GRF moved to dismiss Mr. Martin's amended complaint. Regarding duty and breach of duty, GRF used a footnote at the end of its "Introduction" section to state that it "contends that the claim in the Amended Complaint will fail because there is not proof of an actionable duty, or breach of duty, and also due to the contributory negligence or assumption of risk by Plaintiff."[31] However, GRF notes that "this particular Motion does not present argument on those issues."[32]

Regarding causation, GRF argues that Mr. Martin's claim is too speculative to sustain a cause of action. According to GRF, the question presented is "whether or not the failure to port the DSUE to Mr. Martin has or will probably cause harm to [Mr. Martin]."[33] GRF contends that "the 'loss' of portability of Ms. Winkler's DSUE has caused no harm at this time," because Mr. Martin "does not allege that he has currently incurred any current gift or estate tax liability as a result of the missed portability election."[34]

Regarding damages, GRF argues that the damages alleged in the amended complaint are speculative, hypothetical, remote, and contingent because "there are

[30] FAC at ¶ 13.

[31] Motion to Dismiss ("MTD") at p. 3.

[32] MTD at p. 3.

[33] MTD at p. 5

[34] MTD at p. 5.

numerous scenarios in which Ms. Winkler's DSUE could not or would not be used by Mr. Martin or Mr. Martin's estate."[35]

Finally, GRF argues that Mr. Martin lacks standing to sue for claims on behalf of his own estate. GRF argues that "in paragraphs 9, 10, and 15 of the Amended Complaint, Mr. Martin also appears to try to assert a claim on behalf of his own future estate, after his death."[36] GRF highlights that, in those paragraphs, Mr. Martin "asserts that Ms. Winkler's DSUE, to the extent it is not fully applied to taxable lifetime gifts given by him, would have been available to shelter the part of his estate (if any) that exceeds his own applicable gift and estate tax exclusions, and the lack of that DSUE because of the missed portability may mean his estate can shelter less from estate taxes."[37] Finally, GRF argues that, if such harm to his estate in the form of additional estate tax were ever to come to fruition, the harm would be to the estate, not to the then-deceased Mr. Martin.[38]

Discussion

Professional Negligence

"The elements required to establish a cause of action for professional negligence are equivalent to the elements required in a standard negligence action; the professional, however, is held to the standard of care that prevails in his or her profession." *Balfour*, 226 Md. App. at 438 (citing *Crockett v. Crothers*, 264 Md. 222, 224-225 (1972)). "'[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or

[35] MTD at p. 7.

[36] MTD p. 11.

[37] MTD at p. 11.

[38] MTD at p. 11.

trade in good standing in similar communities.'" *Balfour*, 226 Md. App. 438 (quoting Restatement (Second) of Torts § 299A (1965)). "To sustain a cause of action for negligence, a complaint must allege facts sufficient to support a finding of: 1) duty to the plaintiff (or to a class of which the plaintiff is a part), 2) a breach of that duty, and 3) a causal relationship between the breach and the harm, and 4) the damages suffered." *Balfour*, 226 Md. App. at 438; *See Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 655 (2000); *Jacques v. First Nat'l Bank*, 307 Md. 527, 531 (1986).

According to the Court of Appeals, "in determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties." *Jacques*, 307 Md. at 534. "Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability." *Jacques*, 307 Md. at 534. "This intimate nexus is satisfied by contractual privity or its equivalent." *Jacques*, 307 Md. at 534-535.

Here, Mr. Martin alleges that GRF held itself out as an "accounting firm possessing the requisite skill of the profession" and thus owed Mr. Martin a duty of care to perform accounting services it undertook on his behalf with reasonable care. Mr. Martin also alleges that, within twelve days of his wife's death, he asked GRF, the accounting firm that had filed his wife's tax returns for the last 30 years, "to think about things I need to do with regard to tax authorities…in the way of notices or valuations" and to "[l]et me know what I should be thinking about." Mr. Martin alleges that, in response, the firm told him that "unfortunately everything needs formal appraisals. The

federal estate forms require this." Mr. Martin argues that a reasonable person in his shoes would have interpreted this exchange to mean that GRF was accepting responsibility for the preparation and filing of his wife's estate tax returns within the applicable timeframes or for making sure that Mr. Martin was seeking advice from other professionals in time to protect his interests. The court concludes that Mr. Martin has alleged facts sufficient to support a finding that GRF owed Mr. Martin a duty to either file his wife's estate tax return timely or inform him that he needed to seek advice from elsewhere in time to protect his interests.

Second, a plaintiff must allege facts sufficient to support a finding that the defendant breached the duty of care it owed to the plaintiff. "A duty is breached when a person or entity fails to conform to an appropriate standard of care." *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 501 (2011). As stated above, in a professional negligence action, the professional is held to the standard of care that prevails in his or her profession. *Balfour*, 226 Md. App. at 438.

Here, Mr. Martin alleges that GRF breached its duty to provide accounting services with the requisite skill of the profession when it failed to timely file his wife's estate tax return. The court concludes that Mr. Martin has alleged facts sufficient to support a finding that GRF breached the duty it owed him when it failed to meet a routine tax filing deadline.

Third, a plaintiff must allege facts sufficient to support a finding that the defendant's breach proximately caused the alleged harm. "In order to be a proximate cause, the negligence must be 1) a cause in fact, and 2) a legally cognizable cause." *Atlantic Mut. Ins. Co. v. Kenney*, 323 Md. 116, 127 (1991). "Causation-in-fact concerns

the threshold inquiry of 'whether defendant's conduct actually produced an injury.'" *Pittway Corp. v. Collins*, 409 Md. 218, 244 (2009) (quoting *Peterson v. Underwood*, 258 Md. 9, 16 (1970)). "Two tests have developed to determine if causation-in-fact exists, the but for test and the substantial factor test." *Pittway*, 409 Md. at 244. The "but for" test "applies when the injury would not have occurred in the absence of the defendant's negligent act." *Yonce v. Smithkline Beecham Clinical Labs., Inc.*, 111 Md. App. 124, 138 (1996). The substantial factor test was created to resolve "situations in which two independent causes concur to bring about an injury, and either cause, standing alone, would have wrought the identical harm." *Yonce*, 111 Md. App. at 138. "If causation in fact exists, a defendant will not be relieved from liability for an injury if, at the time of the defendant's negligent act, the defendant should have foreseen the 'general field of danger,' not necessarily the specific kind of harm to which the injured party would be subjected as a result of the defendant's negligence." *Yonce*, 111 Md. App. at 139.

Here, Mr. Martin alleges that GRF's breach of the duty it owed him caused the loss his wife's DSUE, "a valuable tax exclusion that belongs, personally, to [him]." In its motion to dismiss, GRF argues that, since Mr. Martin "does not allege that he has currently incurred any current gift or estate tax liability as a result of the missed portability election," the "loss" of the portability of Ms. Winkler's DSUE has caused no harm to Mr. Martin. This court disagrees.

The Supreme Court of Oklahoma recently considered, among other issues, whether a surviving spouse has a legally protectable, pecuniary interest in the DSUE and whether the administrator of an estate has a fiduciary duty to protect a surviving spouse's interest by preserving the portability of his wife's DSUE. *Vose v. Lee (In re Estate of*

Vose), 390 P.3d 238 (2017). In that case, a surviving spouse filed an application in a probate proceeding to compel the administrator of his wife's estate to timely prepare and file a federal estate tax return for purposes of irrevocably electing portability of his wife's DSUE. *Vose*, 390 P.3d at 241. The administrator of the estate, Lee, was the decedent's son from another marriage. *Vose*, 390 P.3d at 241. Lee argued that, since Vose signed a prenuptial agreement and was not an heir of the decedent, he did not have standing to press his DSUE application. *Vose*, 390 P.3d at 248.

After noting that standing in a probate proceeding generally required a pecuniary interest in the estate of the decedent, the Supreme Court of Oklahoma held that Vose had standing because he had "an obvious interest in the portability of the DSUE." *Vose*, 390 P.3d at 249. The Supreme Court of Oklahoma also held that "[w]hile 26 U.S.C.A 2010 requires the administrator to make the election to allow portability of the DSUE, the only person with an interest in and ability to use the DSUE, if it exists, is the surviving spouse." *Vose*, 390 P.3d at 250. In addition to concluding that Vose had an obvious legal interest, that only he could use, the portability of his wife's DSUE, the Supreme Court of Oklahoma held that Lee, the administrator of the estate, had a fiduciary obligation to preserve the assets of the estate and safeguard Vose's interest in the DSUE. *Vose*, 390 P.3d at 250.

This court concludes that GRF's argument is without merit. Like the Supreme Court of Oklahoma, this court holds that Mr. Martin had an obvious interest in the portability of his wife's DSUE. Consequently, the court determines that Mr. Martin has alleged facts sufficient to support a finding that, but for GRF's breach of the duty it owed him, he would have been able to port his wife's DSUE and add it to his basic exclusion

amount to increase his applicable exclusion amount that he could have used to reduce both the amount of gift transfers subject to federal taxation and the amount of his estate subject to federal taxation. The court also holds that the harm that Mr. Martin suffered was an obvious and foreseeable consequence of missing the deadline to file Form 706.

A plaintiff must allege facts sufficient to prove damages. "It is well established in Maryland that damages based on speculation or conjecture are not recoverable as compensatory damages." *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007). "To recover compensatory damages, the amount must be proved with reasonable certainty and may not be based upon speculation or conjecture." *Brock Bridge Ltd. P'ship v. Dev. Facilitators, Inc.*, 114 Md. App. 144, 157 (1997). The amount of damages "need not be proven to a mathematical certainty; the plaintiff bears the burden of adducing sufficient evidence from which the amount of damages can be determined on 'some rational basis and other than by pure speculation or conjecture.'" *Brock Bridge*, 114 Md. App. 144, 157 (quoting *Ass'n of Maryland Pilots v. Baltimore & Ohio Railroad Co.*, 304 F. Supp. 548, 557 (D.Md.1969)). Instead of requiring "certainty," "recovery may often be based on opinion evidence, in the legal sense of that term, from which liberal inferences may be drawn. Generally, proof of actual or even estimated costs is all that is required with certainty." *M&R Contractors & Builders, Inc. v. Michael*, 215 Md. 340, 348-349 (1958).

Here, Mr. Martin alleges that Ms. Winkler's federal estate tax return shows that she died with $3,575,490.00 of unused DSUE that should have been ported to Mr. Martin and added to his basic exclusion amount. Mr. Martin also alleges that this number may increase because Ms. Winkler's estate tax return may have to be amended. Mr. Martin alleges that, given the size of his estate, his current lifestyle, and the likelihood that the

assets that make up his estate will appreciate in value, he will be able to gift to his sons an amount greater than his basic exclusion amount.

GRF argues that the damages alleged in the amended complaint are "speculative, hypothetical, remote, and contingent," because "there are numerous scenarios in which Ms. Winkler's DSUE could not or would not be used by Mr. Martin or Mr. Martin's estate." This court concludes that GRF's arguments regarding damages are also without merit. Mr. Martin has alleged that, as a direct result of the breach of duty by GRF, he has lost the ability to exclude at least $3.5 million from the amount of his gift transfers and the amount of his estate that will be subject to the federal tax rates provided in 26 U.S.C.A § 2001(c) and 26 U.S.C.A. § 2502. These allegations are sufficient to prove that Mr. Martin suffered damages.

Standing

In its motion to dismiss, GRF argues that "only the personal representative of the future estate would potentially hold the claim for unnecessary estate tax payments."[39] Specifically, it points to paragraphs 9, 10, and 15 of the amended complaint to suggest that Mr. Martin is attempting to bring claims on behalf of his own estate before it exists.

The court views this argument to be without merit. Like the Supreme Court of Oklahoma, this court holds that a surviving spouse has an obvious financial interest in the portability of his wife's DSUE. Critically, the only person with an interest in, and ability to use the DSUE, if it exists, is the surviving spouse. Although Mr. Martin's future estate will have standing to sue for "unnecessary estate tax payments," it might not be able to sue anyone for the particular harm alleged by Mr. Martin in this case.

[39] MTD at p. 11.

Given the mechanics of 26 U.S.C.A. § 2010, as further described in Treas. Reg 20.2010-1, the court finds that paragraphs 9, 10, and 15 of the amended complaint simply describe how the DSUE works. Paragraphs 10 and 15 simply reflect the fact that the DSUE is added to the basic exclusion amount to increase the applicable exclusion amount that allows an estate to reduce the amount of the estate subject to the rate tables described in 26 U.S.C.A. § 2001(c). Similarly, paragraph 9 merely alleges that, at his death, Mr. Martin will leave his estate to his sons. The fact that the DSUE is used to increase the applicable exclusion amount that an estate will use to reduce the amount of the estate subject to federal taxation does not vitiate Mr. Martin's standing to bring this claim.

Conclusion

For the foregoing reasons, the defendant's motion to dismiss is denied.

It is SO ORDERED this 16th day of April, 2021.

Ronald B. Rubin, Judge